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By Environmental Improvement Board at 4:08 pm, Feb 21, 2022

STATE OF NEW MEXICO  
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE APPEAL  
ON AIR QUALITY PERMIT NO. 8585

No. EIB 21-48

EARTH CARE NEW MEXICO, BY MIGUEL ACOSTA MUNOZ  
and LINDA MARIANIELLO, AS AN INDIVIDUAL  
*Petitioners,*

v.

NEW MEXICO ENVIRONMENT DEPARTMENT

and

ASSOCIATED ASPHALT AND MATERIALS, LLC  
*Applicant*

HEARING OFFICER'S ORDER GRANTING IN PART AND DENYING IN PART  
NEW MEXICO ENVIRONMENT DEPARTMENT'S  
("DEPARTMENT" OR "NMED") MOTION *IN LIMINE* ("NMED MOTION")

The Hearing Officer, having considered the NMED Motion, the Community Response in Opposition filed February 16, 2022 ("Community Response"), the NMED Reply filed February 17, 2022 ("NMED Reply") and being otherwise fully advised, **FINDS AND CONCLUDES:**

**BACKGROUND**

1. The central issue raised in the NMED Motion is whether certain portions of the Petitioners Statement of Intent ("SOI") to Present Technical and Non-Technical Testimony comply with the procedural rules governing the proceeding, which are contained in 20.1.2 NMAC.
2. 20.1.2.202(A)(3) NMAC requires that a petition appealing an air quality permitting action of NMED to the Environmental Improvement Board ("EIB" or "Board") shall "identify the permitting action appealed from, specify the portions of the permitting action to which petitioner objects and generally state the objections".

3. The Petition in this appeal states:

“Petitioners appeal the Department’s decision to issue Permit No. 8585 on the following grounds:

a. The Department’s decision approves a definition of ambient air that is contrary to law.

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b. The air dispersion modeling is deficient, violating of the Bureau’s Air Dispersion Modeling Guidelines, EPA Guidance, and applicable law.

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c. The Department’s hearing process violated Title VI of the 1964 Civil Rights Act and the Department’s own policy.”  
Petition at 3-4.

#### **MICHAEL SCHNEIDER’S SOI**

4. NMED’s Reply accurately cites the following summaries of Mr. Schneider’s testimony and requests that the testimony on those subjects be excluded from the record of this appeal:

a. Cumulative Impact Analysis

“The permit should be remanded back to the New Mexico Environment Department for additional consideration of the cumulative impacts of air pollution from AAM and neighboring sources on nearby communities prior to being approved by the Department. The US Environmental Protection Agency has directed all EPA offices to clearly integrate environmental justice concerns into their plans and actions, meaning that the EPA is working to better consider the fair treatment and meaningful involvement of all people, regardless of race, color, culture, national origin and income and educational levels, when it comes to the development, implementation and enforcement of environmental laws, regulations and policies. As a state agency guided by EPA policy”. NMED Reply at 2, summarizing Petitioners’ SOI at 10.

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b. Permit Conditions

“Mr. Schneider will offer the opinion that various permit conditions should be strengthened in order to best protect the health and welfare of the nearby communities.” NMED Reply at 3, summarizing Petitioners’ SOI at 10.

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5. The Petition alleges that the “hearing process violated Title VI of the 1964 Civil Rights Act and the Department’s own policy.” Petition at 4. Mr. Schneider’s Written Report states that the permit should be remanded to NMED for additional consideration of the cumulative impacts of air pollution from the AAM facility and neighboring sources. Petitioners’ SOI at 10; Petitioners Exhibit 10 at 3-4 and 10-19.

6. Section C.2 of the Petition is the portion of the Petition that generally states the objection of the Petitioner. Subsection c. of Section C.2 addresses the alleged violation of Title VI of the 1964 Civil Rights Act. That Section addresses only the alleged failure to allow an interpreter to translate comments of certain limited English proficient (“LEP”) persons who submitted oral comments at the hearing. No reference is made to a cumulative impact analysis, which is proposed and discussed in Petitioner’s’ SOI and Mr. Schneider’s Written Report. In addition, Petitioners’ Response to NMED’s Motion did not address NMED’s assertion in the NMED Motion that the Board does not have subject matter jurisdiction over the cumulative impacts claim. Thus, the record is devoid of any jurisdictional basis for considering the cumulative impacts claim in this proceeding.

7. The portion of Mr. Schneider’s Written Report that proposes and discusses a cumulative impact analysis is outside of the scope of the appeal as set forth in the Petition, is contrary to 20.1.2.202(A)(3) NMAC, lacks jurisdictional support and will not be admitted into evidence. The portion of Mr. Schneider’s Written Report that will not be admitted is:

- a. The conclusion stated in Section 3.2 on pages 3 and 4.
- b. The discussion under Section b. entitled “The Permit Shall be Remanded to the Department for a Cumulative Impacts Analysis” beginning on page 10 and continuing to page 19, including Attachments A, C and D.

8. This decision is made without prejudice to Petitioners' pursuing the cumulative impacts claim in an appropriate federal or state proceeding.

9. With respect to the permit conditions proposed in Mr. Schneider's Written Report, the Petition did not specifically state that Petitioners propose additional permit conditions. The Department's Reply asserts that Mr. Schneider's testimony proposing additional permit conditions "is an attempt to open up the entire Permit", Department Reply at 4, and "has no bearing on" the two specific grounds of appeal stated in the petition. *Id.* The permit conditions proposed by Mr. Schneider appear, for the most part, to be intended to enhance the enforceability of the permit based on his belief that the grounds for appeal stated in the Petition have merit i.e., the modeling applied to the permit was deficient and the definition of "ambient air" applied by the Department is contrary to law. Mr. Schneider's testimony proposing permit conditions may be admitted on the ground that they generally relate to the objections stated in the Petition. This ruling is made without prejudice to NMED's right to make specific objections to certain proposed conditions on the ground that they are unrelated to the specific claims in the Petition.

#### **MIGUEL ACOSTA'S SOI**

10. The summary of Mr. Acosta's Testimony in the Petitioners SOI is composed of following:

Mr. Acosta will testify to the interests of Earth Care New Mexico and its membership in this Matter. Earth Care is an empowerment and community development organization serving neighborhoods in the Airport Road corridor. The Southside of Santa Fe has not seen adequate or equitable public investment in green spaces, culturally or linguistically relevant services, or community development resources, when compared to other parts of Santa Fe. Earth Care provides resources and events that engage Southside Santa Fe residents across generations to make a positive impact in the community and improve environmental and social conditions. Earth Care also coordinates the Santa Fe Mutual Aid project, hosting community events and, to date,

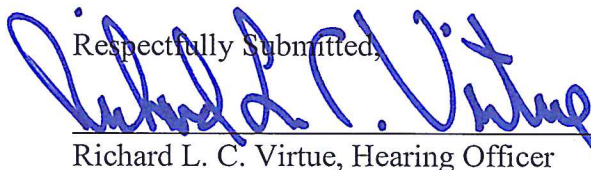
redistributing \$324,000 to community members in Santa Fe, particularly on the South side, for groceries, medicine, household supplies, and rent.

Earth Care's membership is composed of anyone who serves on any campaign or participates in classes, programs and list serves. The membership is geographically based-because most members live, work and play on Santa Fe's South side, the South side is Earth Care's primary membership area and area of attention.  
Petitioners' SOI at 11.

11. NMED asserts that Mr. Acosta's testimony is "not relevant" to the appeal and could be construed as a federal civil rights claim. NMED Reply at 5. The information in Mr. Acosta's SOI is not cast in the form of a claim, nor is it directly relevant to the technical issues raised in the appeal. Nonetheless, his testimony is presented on behalf of a party to the proceeding, provides context to the issues raised in the Petition and may provide information that is useful to the Board. NMED admits that Mr. Acosta's testimony would be allowed if submitted as public comment. Because it has been submitted in the form of testimony, changing its format accomplishes no substantive purpose. Mr. Acosta's non-technical testimony may be admitted in its current form.

**IT IS THEREFORE ORDERED:**

1. The portions of Mr. Schneider's Testimony described in Paragraph 7 of this Order will not be admitted.
2. The portions of Mr. Schneider's Testimony described in Paragraph 9 of this Order may be admitted.
3. Mr. Acosta's non-technical testimony may be admitted.

Respectfully Submitted,  
  
Richard L. C. Virtue, Hearing Officer